Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-360

In the Matter of

Regulation of International Common Carrier Services — RM 7578

NOTICE OF PROPOSED RULEMAKING

Adopted: December 12, 1991; Released: January 10, 1992

Comment Date: February 26, 1992
Reply Comment Date: March 17, 1992

By the Commission: Commissioner Barrett issuing a statement.

I. INTRODUCTION

1. We initiate this proceeding to consider modifications to the policy adopted in our 1985 *International Competitive Carrier* decision regarding regulation of "foreign-owned" U.S. common carriers in their provision of international service.[1] Our decision to initiate this notice of proposed rulemaking is in response to a petition for rulemaking filed by Cable and Wireless Communications, Inc. (C&W) seeking changes to the 1985 foreign ownership policies.[2] C&W asks this Commission to limit dominant carrier regulation of foreign-owned U.S. carriers to those routes where the carrier's foreign affiliate is the dominant provider of international services.

2. We propose to modify the current policy that treats "foreign-owned" U.S. common carriers as dominant in their provision of all international services to all foreign markets in favor of a policy that regulates U.S. international carriers, whether U.S.- or foreign-owned, as dominant only on those routes where their foreign affiliates have the ability to discriminate against non-affiliated U.S. international carriers in the provision of access to bottleneck facilities and services. In modifying the international competitive carrier policy with regard to "foreign-owned" carriers, we do not at this time propose to change other components of our 1985 decision.

II. BACKGROUND

A. Existing Policy

3. In our *International Competitive Carrier* decision, we concluded that we should lessen the burdens of traditional entry and pricing regulation for those international common carriers that faced effective marketplace competition and did not have market power.[3] To assess whether effective competition existed and to determine which carriers continued to have market power, we divided the service offerings into product and geographic markets. For regulatory purposes, we concluded that there are two product markets: 1) international message telephone service, or IMTS, and 2) non-IMTS, or telex, telegraph, private line and other services.[4] Also, we determined that each foreign country was a distinct geographic market. We adopted this country-by-country approach to geographic markets because we found that the requirement to obtain an operating agreement from each country served as a potential competitive barrier.

4. Within the IMTS market, we found that AT&T had market power and was therefore dominant, that is, had the ability to control the price that could be charged for IMTS, primarily because of its market share.[5] We also found certain offshore providers (i.e., in Hawaii, Guam) to be dominant because of their control of bottleneck facilities. By contrast, the carriers providing non-IMTS, including AT&T, were found to be nondominant in their provision of such services, given the competitive nature of the non-IMTS market.[6]

5. In addition, we determined that, because of its ability and incentive to operate in concert with its foreign parent, a foreign-owned U.S. carrier could deny its competitors access to foreign markets or discriminate in the terms of access. We concluded that the most efficient way to encourage the granting of operating agreements and to discourage market distortions was to classify all foreign-owned U.S. carriers as dominant in their provision of all international common carrier services to all foreign points.[7]

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[1] *International Competitive Carrier,* 102 F.C.C. 2d 812 (1985), *recon. denied,* 60 Rad. Reg. (P&F) 2d 1435 (1986).

[2] Cable and Wireless Communications, Inc., Petition for Rulemaking to Modify the Commission's Regulation of International Common Carrier Services Provided by Foreign-Owned U.S. Common Carriers, filed December 3, 1990.

[3] *International Competitive Carrier,* 102 F.C.C. 2d at 821.

[4] We adopted this IMTS/non-IMTS dichotomy after analyzing demand and supply substitutability factors. We noted that the lack of entry barriers is a key to supply substitutability and found that the most significant entry barrier in international communications is the requirement that U.S. carriers obtain an operating agreement from the foreign administration. We found this barrier less relevant for non-IMTS, because the number and nature of existing agreements indicated that it was easier to obtain agreements for non-IMTS than for IMTS services. 100 F.C.C. 2d at 828.

[5] Under traditional antitrust analysis, market power is the ability to control prices or exclude competition. Factors indicative of the ability to control price have included market share, control of facilities, and the lack of actual or potential competition.

[6] In addition to our division of international services into two product markets, IMTS and non-IMTS, we also identified three service products that, in 1985, were provided solely by Comsat: multi-purpose earth stations, television services, and space segment. We found Comsat to be dominant in its provision of these services. 102 F.C.C. 2d at 838-40.

[7] 102 F.C.C. 2d at 842. We provided for a waiver process by which we could grant non-dominant status on a particular route or for a particular foreign-owned U.S. carrier for good public policy reasons. *Id.* at n.74.

6. We defined as foreign-owned any U.S. carrier that is over fifteen percent directly or indirectly owned by a foreign telecommunications entity or on whose board of directors a representative of the foreign telecommunications entity sits.[8] In a subsequent action, we defined a foreign telecommunications entity as including a telecommunications or telecommunication-related equipment manufacturer, equipment supplier, or service provider.[9]

7. Pursuant to the 1985 policy, foreign-owned U.S. carriers remain subject to traditional entry and price regulation. Thus, unlike their nondominant competitors, foreign-owned U.S. carriers must file a Section 214 application for all circuits they seek to acquire. They must cost support their tariff filings and implement these filings only after the longer dominant carrier notice periods. Additionally, they must report quarterly on their traffic and revenues, in addition to the annual reports required generally of all international carriers.

8. By comparison, nondominant providers of international common carrier services are subject to streamlined facility and tariff regulation.[10] In particular, a nondominant carrier may make its tariffs effective on shorter notice periods, is not subject to the requirement that tariffs be cost supported, and its tariffs are presumptively legal. Further, under streamlined regulation, once a carrier obtains initial Commission certification to provide a particular service to a specific country that carrier is not required to file further applications to add circuits or change facilities to provide services within that same product market to serve that country. Instead, it must file semi-annual reports listing the capacity it has added to that previously authorized by the Commission.

B. C&W Petition

9. On December 3, 1990, C&W, a foreign-owned U.S. common carrier,[11] filed a petition for rulemaking asking this Commission to revisit the *International Competitive Carrier* decision and limit dominant regulation of foreign-owned U.S. carriers to those routes where the carrier's foreign affiliate is the dominant provider of international services. C&W observes that, since the Commission adopted its 1985 foreign-owned carrier policy, U.S. service providers have made great progress in securing operating agreements with foreign administrations and the opportunity for U.S. firms to participate in telecommunications businesses has increased markedly around the world.

10. C&W states that the 1985 policy has had an anticompetitive effect on foreign-owned U.S. carriers by inhibiting the firms' ability to provide U.S. consumers competitive international services with the speed and flexibility required in the marketplace. In particular, C&W observes that the limitations placed on its Section 214 authorizations require C&W repeatedly to return for additional authorizations for insignificant changes in service offerings.[12] In the tariff area, C&W states that the delays inherent in filing tariffs on longer notice periods, even where the foreign-owned U.S. carrier simply is reselling a nondominant carrier's tariff offerings, penalizes foreign-owned U.S. carriers in the marketplace.

11. C&W asserts that a foreign correspondent's ability to damage competition or to treat U.S. carriers inequitably requires, first, a presence in the foreign market and, second, a dominant presence. C&W contends that its proposal would eliminate the overbreadth of the existing policy that applies on all routes, even where the foreign-owned U.S. carrier's parent or affiliate has no dominant presence in the foreign point, while retaining sufficient regulatory flexibility to protect the interests of U.S. ratepayers and business enterprises.

12. C&W's petition was placed on public notice, with comments and reply comments filed, respectively, on January 28, 1991 and February 12, 1991. Eight parties supported the proposal to initiate a rulemaking and six parties opposed C&W's petition. Those parties supporting C&W's proposal are the British Embassy, C&W, ComSystems, IDB, LiTel, McCaw, the U.S. Department of Treasury and Worldcom. Those opposing C&W's petition are AT&T, BT, Comsat, MCI, PanAmSat and Sprint.

C. Comments

13. The parties opposing C&W's petition argue that the 1985 foreign-owned carrier policy continues to have validity because foreign-owned U.S. carriers have the ability to inhibit U.S. carriers' access to foreign markets. They oppose limiting the foreign-owned carrier policy only to those carriers affiliated with foreign telecommunications entities that are dominant in a foreign market. Noting that since the adoption of the foreign-owned carrier policy the Commission has identified other issues regarding arrangements between U.S. carriers and their foreign correspondents, AT&T suggests that a foreign telecommunications entity, even where it has a limited market position in the foreign market, may impede the development of

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[8] *Id.* at n.74. A number of U.S. carriers have been classified as dominant in their provision of international common carrier services pursuant to the foreign-owned carrier provision of International Competitive Carrier. These include C&W (formerly TDX), 102 F.C.C. 2d at 842 n.75; Worldcom, 4 FCC Rcd. 2219 (CCB 1989); IDB, Letter to R. Koppel from Chief, International Facilities Division, File No. CSG 90-015-AL, Dec. 21, 1989; ComSystems, 5 FCC Rcd. 696 (CCB 1990); Fondo Unimex, 4 FCC Rcd. 8185 (CCB 1989) and Gimex, 4 FCC Rcd. 4522 (CCB 1989).

[9] *Regulatory Policies and International Telecommunications, Report and Order and Supplemental Notice of Inquiry,* FCC 88-71 (released March 25, 1988) at 43 n.74.

[10] Unlike the Commission's decisions in its domestic Competitive Carrier proceeding, which adopted a regulatory regime of forbearance for nondominant service and facility providers, the Commission's decision in *International Competitive Carrier* adopted streamlined entry and tariff regulation of nondominant international carriers. Streamlined regulation requires international common carriers to file Section 214 applications for initial certification that provision of a particular service to a specific country is in the public interest. Streamlined regulation, unlike forbearance, also requires that international common carriers file tariffs setting forth the rates and terms of their international service offerings.

[11] C&W is a wholly-owned U.S. subsidiary of Cable and Wireless North America, which itself is a wholly-owned U.S. subsidiary of Cable and Wireless PLC of the United Kingdom. Cable and Wireless PLC provides communications services to customers through its subsidiaries in the U.S., U.K., Hong Kong and other geographic markets.

[12] For example, C&W states that its Section 214 authorizations to offer resale services were limited to resale of the underlying carrier tariffs that existed at the time of C&W's Section 214 authorization, and to the points then listed in those underlying tariffs.

competition through interconnection, return traffic, settlements and other arrangements favoring its U.S. affiliate. AT&T states that these concerns may be relevant in determining whether an individual foreign-owned U.S. carrier should be regulated as dominant for its provision of international services. BT argues that the Commission should not assess whether a foreign-owned U.S. carrier's foreign affiliate is dominant in a foreign market, but should determine whether a particular foreign market is open. BT contends that the Commission should exempt all foreign owned U.S. carriers affiliated with U.K. firms from the dominant classification given the openness of the U.K. market.

14. The parties opposing C&W's petition also contend that the foreign-owned carrier policy should not be limited only to the home market of the foreign telecommunications entity. They suggest that a foreign telecommunications entity may affect the development of competition in third countries where it has no market presence by exercising influence over other telecommunications administrations with which it provides international services. Further, they contend that non-dominant regulation would not afford the Commission the comparable monitoring capability, timely and detailed information, and regulatory leverage that they contend is essential to assuring fairness and reciprocity in the treatment of U.S. carriers in foreign markets. PanAmSat states, for example, that the relevant fact for reciprocity purposes is not whether a foreign-owned U.S. carrier is dominant in particular markets abroad, but rather that the foreign-owned U.S. carrier is taking advantage of the openness of the U.S. market while benefitting from closed markets elsewhere.

15. Parties opposing C&W's petition also contend that the Commission is not equipped to assess the competitiveness of foreign markets. They state that the C&W proposal would require the Commission to investigate a wide variety of factors, would be immensely complicated, and would not be a productive use of the Commission's limited resources. They also state that supporters of C&W's petition fail to demonstrate that the burdens of dominant carrier regulation are so onerous as to handicap foreign-owned U.S. carriers from competing effectively with U.S.-owned carriers. Thus, they favor retention of dominant status for foreign-owned U.S. carriers. Also, they observe that any of the foreign-owned U.S. carriers supporting C&W's petition are free under current policy to file a request for a waiver.

16. Those parties supporting C&W's proposal assert that the current foreign-owned carrier policy should be changed because it is overbroad in scope and burdensome on foreign-owned U.S. carriers. In particular, supporters claim that the definition of a "foreign telecommunications entity" should be narrowed so as not to include equipment manufacturers or suppliers but to be limited to foreign service providers that have the ability to influence reciprocal entry of U.S. carriers into the foreign market. Supporters also urge that the current policy be tailored to apply only on those geographic routes where the U.S. carrier's foreign affiliate is dominant in the provision of international services from the foreign point.

17. In addition, ComSystems and McCaw urge the Commission to exempt resellers from the reach of the foreign-owned carrier policy, because resellers' international offerings are based on service they take from unaffiliated U.S. facilities-based carriers and not on any correspondent relationship. Worldcom and McCaw question the fifteen percent foreign ownership benchmark in that it treats U.S. carriers with non-controlling foreign investors as though they were wholly-owned by foreign interests. Worldcom would establish a 50 percent foreign ownership benchmark for control; McCaw suggests that the foreign-owned carrier policy should not classify U.S. carriers as dominant where the non-U.S. ownership is non-controlling and consistent with Section 310(b) of the Communications Act, 47 U.S.C. Section 310(b).

18. The U.S. Department of the Treasury observes that the foreign-owned carrier policy, with differential treatment of foreign-owned firms in the U.S., has implications for U.S. foreign investment policy. Citing the Economic Report of the President,[13] seeking to reduce existing barriers to international investment throughout the world, Treasury states that more onerous regulatory requirements should not be placed on foreign-owned carriers unless and to the extent this differential treatment clearly can be justified by well-defined competition policy concerns. LiTel states that the foreign-owned carrier policy is contrary to U.S. trade policies, including the principles of national treatment and nondiscrimination. The British Embassy observes that the effects of the current regulatory framework in the United States will be the subject of further consideration by the British Government in the context of the decision it will be taking about whether to permit international simple resale. The British Embassy states that, before deciding to authorize international simple resale between the U.K. and the U.S., the British Government would need to be assured that the practical application of Section 214 did not place British-owned entities at a disadvantage as compared with U.S.-owned companies.

19. LiTel also comments that the foreign-owned carrier policy is not based on a factual record of documented discrimination against U.S. carriers in foreign markets, but on mere speculation and conjecture. LiTel observes that the Commission proposed to find carriers dominant even though they lacked market power. It further observes that the Commission, in 1985, stated that it was not equipped to consider the domestic markets of foreign countries and therefore contends the Commission did not know whether the problem to which its policy was directed even existed.

20. Finally, Worldcom and ComSystems observe that their petitions, under the current waiver procedure, for a declaratory ruling that they are non-dominant or a waiver of the dominant carrier rules, have been pending, respectively, since August 22, 1989 and June 11, 1990.

III. DISCUSSION

21. In 1985, when we adopted the *International Competitive Carrier* decision, the U.S. market for international telecommunications services already had experienced rapid growth and substantial transformation in terms of new

[13] Economic Report of the President, Transmitted to Congress February 1990 (U.S. Government Printing Office 1990).

carriers and new services.[14] In addition, we had recently adopted a number of decisions designed to provide a greater range of service and facility options for customers and carriers.[15] We therefore concluded that we should lessen the burdens of regulation for those international service and facility providers that faced effective marketplace competition and did not have market power.

22. Our concerns with foreign-owned carriers, however, went beyond the question of market power.[16] We were concerned that a U.S. carrier owned by a foreign telecommunications entity might operate together with its foreign affiliate to deny nonaffiliated U.S. competitors operating agreements or to discriminate against other carriers in terms of access. The ability to foreclose or impede access to a foreign market resulted from the traditional monopoly status of the state-owned foreign administrations that served as the foreign correspondents for bilateral arrangements with U.S. telecommunications firms.[17] The incentive to discriminate in favor of its U.S. affiliate resulted from the foreign telecommunications entity's non-passive financial investment interest in the U.S. affiliate.[18] Because of these concerns, we concluded that imposition of dominant status for foreign-owned U.S. carriers in their provision of international services would encourage affiliated foreign telecommunications entities to grant operating agreements to non-affiliated U.S. carriers and would discourage market entry restrictions, such as unequal interconnection and other forms of discrimination against non-affiliated U.S. carriers.[19]

23. *Basis for modifying policy.* Since our adoption of this policy U.S. carriers have been increasingly successful in obtaining operating agreements for IMTS service. In 1985 only six of the top twenty markets in 1985 were open to competitive provision of IMTS by U.S. carriers.[20] AT&T was the only IMTS provider to most countries. For example, in the top twenty IMTS markets, AT&T was the sole IMTS provider for West Germany, Japan, Korea, France, the Philippines, Italy, Colombia, the Dominican Republic, Israel, Jamaica, Switzerland, India, El Salvador and the Netherlands.[21] Now, multiple U.S. carriers have acquired operating agreements to provide IMTS to many countries, including all but one of the top twenty markets. US Sprint and MCI have direct operating agreements with at least 39 and 78 countries respectively, and there has been a corresponding increase in the market shares of these carriers. While AT&T continues to maintain the largest shares of these markets, the trend has been toward growth by other carriers.

24. Additionally, during the same time period, some foreign administrations have begun to privatize their telecommunications properties, to open telecommunications services markets to entry by new providers and to take other steps to make their markets more competitive for the provision of telecommunications services. In this context we note the 1990 study of the Department of Commerce which observed that "... telecommunications has become a global industry, and national telecommunications networks, faced with pressures beyond their control, are no longer guaranteed the luxury of existing as "insular monopoly entities."[22] The report states that, "[T]he result of these pressures has been a gradual movement toward the easing of monopolies and a shift toward increased competition in the provision of telecommunications equipment and services in a number of countries around the world."[23]

25. As a result of these market changes, we tentatively conclude that the emphasis of the current foreign-owned carrier policy is no longer appropriate. While we remain concerned about the potential for preferential treatment that may be accorded U.S. carriers by their affiliates in foreign markets, we believe that the current policy can be modified in light of the progress that has been made to date by U.S. carriers in obtaining operating agreements and our desire to encourage further market openings in other countries. Our major continuing concern is that international carriers not be in a position to impede competition for U.S. international communications through discriminatory use of bottleneck facilities. We propose therefore to change our policy from one that imposes dominant carrier regulation based only on the existence of an ownership affiliation between U.S. and foreign telecommunications entities to one that imposes dominant regulation on U.S. international carriers only on those routes where there is a substantial possibility of anticompetitive effects on the U.S. international service market.

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[14] *International Competitive Carrier,* 102 F.C.C. 2d at 820.

[15] *Id.* at 821. These included *Authorized User,* 100 F.C.C. 2d 177 (1985), *aff'd,* 804 F.2d 1280 (D.C. Cir. 1986)(allowing non-common carriers to lease Intelsat capacity directly from Comsat and permitting Comsat, through a separate subsidiary, to provide end-to-end services), *Modification of Policy on Ownership and Operating of U.S. Earth Stations that Operate with the Intelsat Global Communications Satellite System,* 100 F.C.C. 2d 250 (1984)(providing for the independent ownership of international earth stations), *Establishment of Satellite Systems Providing International Communications,* 101 F.C.C. 2d 1046 (1985)(permitting international communications satellite systems separate from the Intelsat system), and *TelOptik, Ltd.,* 100 F.C.C. 2d 1033 (1985)(permitting private, noncommon carrier transoceanic submarine cables).

[16] *International Competitive Carrier,* Notice of Proposed Rulemaking, FCC 85-177 (released April 19, 1985) at 16 n.35 (although foreign-owned U.S. carriers might not have market power, concern that they might operate in concert with their foreign parents).

[17] 102 F.C.C. 2d at 828.

[18] *See* 60 Rad. Reg. 2d (P&F) 1435, 1441-42 (1986); 102 F.C.C. 2d at 842 n.74.

[19] In this regard, we provided for a process in which waivers may be granted in instances in which large investments are passive and for other good public policy reasons. We said that this waiver policy would be applied under our public interest standard on a carrier-by-carrier or country-by-country basis. *See* 102 F.C.C. 2d at 842 n.74.

[20] Even in those markets, AT&T in 1985 was the overwhelming U.S. service provider, and the market shares of the additional IMTS providers were negligible.

[21] Trends in the International Communications Industry, 1975-1990, Federal Communications Commission (Industry Analysis Division, October 4, 1991)(hereinafter, Trends) at 30.

[22] U.S. Telecommunications in a Global Economy: Competitiveness at a Crossroads, Department of Commerce (August 1990) at p. 72.

[23] *Id.* The Department of Commerce report contains discussion of the changing regulatory policies in a number of different countries.

26. The ability to inhibit U.S. carrier competition to any particular foreign market or to treat U.S. carriers inequitably primarily arises from the ability of the affiliated correspondent in that foreign market to discriminate against non-affiliated U.S. carriers in terms of operating agreements and access to bottleneck facilities. Our current policy of encompassing routes where the affiliated correspondent may not have this ability results in unnecessary application of Commission regulation, particularly now when the concerns that caused the Commission to adopt the foreign-owned carrier policy in 1985 have been addressed in many markets.

27. Moreover, we note that U.S. companies have made significant telecommunications investments in other countries over the past several years. We are encouraged by their progress and observe that, in some instances, these investments have resulted in U.S. companies acquiring control of bottleneck facilities in foreign markets. To the extent that we are concerned with the ability of a foreign affiliate to deny IMTS operating agreements to non-affiliated U.S. carriers and to discriminate against such carriers in the terms of access, these same concerns apply when a U.S.-owned company acquires foreign bottleneck facilities and also is affiliated with a U.S. carrier in its provision of international services from the United States.

28. *Emphasis on Discriminatory Use of Bottleneck Facilities.* We propose therefore to modify the 1985 foreign-owned carrier policy in favor of a policy that regulates U.S. carriers, whether U.S.- or foreign-owned, as dominant only to those countries where the U.S. carrier's affiliate has the ability to discriminate against non-affiliated U.S. carriers in their provision of international services. This proposed policy would not change the dominant classification of AT&T, Comsat and other carriers that are dominant under other provisions of our 1985 decision. We will not consider in this proceeding the overall competitiveness of IMTS. As we stated in our *Report and Order* in CC Docket No. 90-132, we believe that this question is more appropriately treated as a separate matter.[24] Similarly, we do not propose to consider in this proceeding our regulation of Comsat, which continues to be the sole provider of INTELSAT and Inmarsat space segment in the United States.

29. We tentatively conclude that traditional Title II rate and entry regulation of U.S. international carriers is warranted only for those routes where the U.S. international carrier's affiliate has the ability to discriminate through control of bottleneck services or facilities in a foreign market. There are two steps in identifying "bottleneck services and facilities." First, we must identify the types of services and facilities that a U.S. international carrier's affiliate potentially could use to discriminate among competing U.S. carriers in the foreign market. Second, we must identify the circumstances that would warrant the conclusion that the affiliate has bottleneck control, *i.e.*, market power, in the provision of such services and facilities.

30. Turning to the first step, we propose to include only those types of facilities and services that the Commission regulates as common carriage in the United States and that also are used to deliver U.S. international traffic into a foreign market. By taking this approach, we intend to exclude from our definition the provision or manufacture of: private cable and satellite services and facilities; cable television services and facilities; and the hardware and software components that support the telecommunications infrastructure. We intend to include international services and facilities, up to and including the international switch, that are required to deliver U.S. international traffic into the foreign market.[25] We request comment on this approach.

31. In reaching this tentative conclusion, we agree with and have sought to accommodate the concerns of those parties that support applying dominant carrier regulation only to affiliates of those telecommunications providers that may have the ability to influence reciprocal entry of non-affiliated U.S. carriers into a foreign market.[26] We also have sought to avoid, to the extent possible, difficulties associated with identifying bottleneck services and facilities in the context of a foreign market infrastructure. We recognize that some parties believe we should include the intercity and local access services and facilities that are used to both originate and terminate U.S. international services in foreign markets.[27] Other parties counter, however, that by taking such a broad view, the Commission could inhibit further liberalization in other countries through, for example, the implementation of international resale. We therefore request comment on whether to extend the definition of bottleneck facilities and services beyond the international switch.

32. The second task involved in defining "bottleneck services and facilities" is identifying the circumstances that would warrant the conclusion that a U.S. carrier's affiliate has bottleneck control in a foreign market, *i.e.*, market power in the provision of services and facilities that could be used to discriminate among competing U.S. international carriers. We tentatively conclude that the definition of "bottleneck control" should include the existence of a legally protected monopoly or a monopoly in fact for the provision of the telecommunications services and facilities discussed above. Under such a definition, we would regulate as dominant any U.S. international carrier on any route where its affiliate enjoys this degree of market power in the provision of such services and facilities. At the same time, based on our experience in the United States, we believe it is appropriate to recognize the efficacy of regulatory policy in controlling the ability of a carrier to engage in discrimination through control of

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[24] *See* Competition in the Interstate Interexchange Marketplace, FCC 91-251 (released September 16, 1991) at para. 161, where we found that there was insufficient evidence on the record on which to draw definitive conclusions about the competitiveness of IMTS. We said that we could not reach definitive conclusions on this matter until we received additional information.

[25] The provision of such international facilities and services may involve, for example, issuance of operating agreements permitting entry into a market; owning or leasing half-circuits in submarine cables and INTELSAT satellite facilities; operating such facilities to originate international telephone or telegraph service from end users in the foreign market and terminate in-bound traffic from foreign correspondents; and making available for resale such facilities to non-facilities-based carriers for the origination or termination of international traffic.

[26] *See supra* paras. 16 and 30.

[27] For example, a U.S.-based carrier may need to obtain from a non-affiliated carrier the foreign half-circuits and dedicated access facilities to its customers' foreign premises.

bottleneck services and facilities. Therefore, where the traditional monopoly found in most countries for telecommunications has been eliminated or placed under effective public regulation, we would place the burden on the U.S. carrier to demonstrate that its affiliate no longer controls bottleneck facilities in that market or that its affiliate otherwise no longer has the ability to discriminate against non-affiliated U.S. carriers. The progress of the United Kingdom and Japan, for example, in liberalizing their telecommunications markets might be part of a showing a carrier may make in seeking to meet the requirements we propose.

33. We would anticipate that the incumbent provider of telecommunications services and facilities in the foreign market may face only limited competition, at least initially, from new entrants. To make the non-discrimination showing we propose, the incumbent's U.S. affiliate may demonstrate that the foreign market for the incumbent's services and facilities is open and competitive; that is, that it does not have market power in the relevant market segment. Alternatively, the incumbent's U.S. affiliate may demonstrate the existence of a legal and regulatory structure that effectively prevents discrimination against non-affiliated U.S. carriers.[28] We request comment on these proposals, and on other means of analysis and relevant factors that should be addressed.

34. As a final matter, we propose to apply our modified policy to U.S. facilities-based carriers and resale carriers alike. Concurrent with the adoption of this Notice of Proposed Rulemaking, we have adopted a Report and Order in CC Docket No. 90-337[29] under which we may authorize the resale of international private lines for the provision of basic telecommunications services. Resellers also may continue their practice of reselling a carrier's international message telephone service (IMTS), and they may choose to supplement their operations through the acquisition of facilities. We believe it would be difficult to distinguish a carrier's regulatory status for purposes of this proceeding based on the means by which it provides U.S. international service. Commenters addressing our proposal to treat facilities-based and resale carriers alike may wish additionally to discuss the potential for discrimination by a foreign telecommunications provider in favor of an affiliated U.S. carrier that is merely reselling IMTS.

35. *Definition of Affiliate.* For purposes of implementing this proposed policy, we propose to define an affiliate as any entity that controls, is controlled by, or is under common control with a provider of telecommunications services or facilities in a foreign market. Given the variety of ownership structures presented by public and private corporations, partnerships and joint ventures, it has been this Commission's experience that control must be assessed on a case-by-case basis.[30] Therefore, rather than rely on a specific ownership percentage benchmark to define control, we propose to rely in the first instance on the submission of certifications and ownership information by applicants seeking carrier authorization under Section 214. We would require that each Section 214 applicant certify to this Commission, under Part 63 of the Rules, that it is not affiliated, as defined above, with a provider of telecommunications services or facilities in the country to which it seeks to provide service. Any applicant unable to make such a certification would be regulated as dominant for U.S. international service to that country unless it could demonstrate in its application that its affiliate does not have the ability to discriminate through control of bottleneck facilities or services against non-affiliated U.S. international carriers.

36. Under this proposal, we additionally would require that each applicant provide the name, address, citizenship, and principal businesses of its principal stockholders or other equity holders,[31] and that each applicant identify any interlocking directorates. We believe this information would enable the Commission, and other interested parties, to ascertain whether a substantial question of fact exists as to the certification given by the applicant.[32]

37. The definition of affiliate that we propose focuses on a U.S. international carrier's relationship with an individual telecommunications provider in a foreign market. As an alternative to this approach, we request comment on whether the public interest requires that we consider, in defining affiliation, levels of ownership that may, either standing alone, or, when combined with other ownership interests, constitute the substantial ability to influence the affairs of a company. Under this alternative approach, we could require that applicants provide the same general ownership information specified above but require that they certify that, collectively, 50 percent or more of their equity is not owned of record by, or for the benefit of, one or more providers of foreign telecommuni-

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[28] Similarly, C&W could submit a showing to the Commission to change its regulatory status to the United Kingdom. C&W could argue, as it does in its petition, that Mercury Communications does not now control, and has never controlled, bottleneck facilities in the United Kingdom, or that Mercury does not otherwise have the ability to discriminate against non-affiliated U.S. international carriers. We may address the merits of such arguments in this proceeding. We necessarily would do so in response to a petition for declaratory ruling or in the context of a Section 214 application.

[29] *Regulation of International Accounting Rates, Phase II,* FCC 91-401, adopted December 12, 1991.

[30] Commission licensees and permittees, as well as applicants seeking authorization under Titles II and III of the Communications Act, are regularly engaged in making assessments of control in order to avoid violations of Sections 310(d) and 214(a) of the Act. Moreover, FCC Form 430 currently requires that Title III common carriers certify whether a corporate licensee is directly or indirectly controlled by any other corporation. We intend that applicants for Section 214 authorization prepare the certifications proposed here consistent with Commission case law on control. *See, e.g., Rochester Tel. Corp. v. United States,* 23 F. Supp. 634, 636 (W. D. N. Y. 1938), *aff'd,* 307 U.S. 125 (1939)(definition encompasses every form of control, actual or legal, direct or indirect, negative or affirmative). *See also Benjamin L. Dubb,* 16 F.C.C. 274, 289 (1951); *Intermountain Microwave,* 24 Rad. Reg. (P&F) 983, 984 (1963); *Turner Broadcasting System, Inc.,* 101 F.C.C. 2d 843, 848 (1985); *William S. Paley,* 1 FCC Rcd 1025 (1986), *recon. denied,* 2 FCC Rcd 2274 (1987), *aff'd sub nom. Fairness in Media v. FCC,* 851 F.2d 1500 (D.C. Cir.) (per curiam), *cert. denied,* 488 U.S. 893 (1988).

[31] FCC Form 430," Common Carrier and Satellite Radio Licensee Qualification Report," requires the submission of similar information.

[32] Should there be instances of collusion in favor of a U.S. international carrier that is owned, in part, by providers of

cations services or facilities.[33] Where the applicant cannot make the required certification, we would regulate it as dominant in its provision of U.S. international service to each market for which the applicant cannot demonstrate that such a provider does not have the ability to discriminate against non-affiliated U.S. carriers through the control of bottleneck facilities.

38. Although we tentatively conclude that control is the proper standard for triggering a cognizable affiliation with providers of telecommunications services or facilities, we request comment on another alternative approach. Commenters are invited to address whether the public interest requires that we also focus on substantial ownership or management interests that may fall short of control. Our current ownership "benchmark," for example, is 15 percent.[34] Commenters therefore may address whether, where the ownership or management interest (i.e., participation on the Board of Directors) of a telecommunications provider in a foreign market reaches a given level that may fall short of control, we should nonetheless require the carrier to demonstrate that the provider does not have the ability to discriminate in its home market against non-affiliated U.S. carriers. Commenters also should address whether we should raise the current 15 percent benchmark as a more relevant standard for the concerns addressed in this Notice.[35]

39. *Other Considerations.* We request comment on the effect of our proposal on U.S. carriers not currently classified as dominant that are affiliated with telecommunications providers in a foreign market. We additionally invite parties to comment on the potential for a telecommunications provider to leverage its foreign market bottleneck into other markets where it has no bottleneck control.[36] For example, would a country grant favorable treatment to a U.S. carrier because it is able to obtain from the affiliate of the U.S. carrier a favorable accounting rate to another country? We request comment on whether there is a substantial possibility of such behavior occurring and, if so, whether it could be offset by requiring that a U.S. carrier regulated as dominant for one international route file for all routes served the quarterly traffic reports presently imposed on foreign-owned carriers. Similarly, where a U.S. carrier or its affiliate enters into an agreement (other than a standard operating agreement) with other carriers that have the ability to discriminate among U.S. carriers through control of bottleneck facilities in other countries, and such an agreement affects traffic flows to or from the United States, should we impose dominant-carrier regulation on the U.S. carrier for those points that are subject to the agreement? If dominant regulation is deemed appropriate, in these circumstances, how would it be implemented?

40. *Public Benefits.* We believe that the modified policy proposed here is consistent with the overall goals of the Commission in encouraging competition. The proposed approach also would avoid the appearance of unequal treatment of foreign-owned carriers because dominant status on specific routes would not be based on the foreign ownership of the U.S. carrier but on the bottleneck control of the carrier's affiliate in the foreign market. By refocusing on those routes where the foreign affiliate has bottleneck control, we believe it would continue to promote the 1985 policy objective of fostering multiple operating agreements and protecting other U.S. carriers from discriminatory treatment. Additionally, for those routes where we are able to move to streamlined regulation of U.S. carriers currently treated as dominant under the foreign-owned U.S. carrier policy, the same benefits that accrued to U.S. consumers from our streamlining six years ago will redound to U.S. consumers from our streamlining of foreign-owned U.S. carriers on those routes where we no longer need to apply dominant carrier regulation. Finally, we request comment on whether our proposed policy will be more conducive to foreign capital investment in U.S. industry that may be in the public interest.[37]

41. *Filing requirements.* As discussed in paragraph 35 above, we propose to amend Part 63 of our Rules to require each applicant for Section 214 authority to provide international common carrier services to certify that it is not affiliated with a telecommunications facilities or service provider in the country to which it seeks to provide service. We also propose to amend Part 43 of our Rules to require all authorized U.S. international carriers affiliated with providers of telecommunications facilities and services in a foreign market to provide a list of such affiliations within ninety days of the release date of the Report and Order adopted in this proceeding. Also, we propose to require any authorized international carrier that subsequently becomes affiliated with a facilities or service provider in a foreign market to notify the Commission within 90 days of the transaction.

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international telecommunications facilities and services in several countries, we shall take whatever steps are necessary to address such collusion.

[33] We request comment how best to assess the collective influence of the U.S. carrier's Board of Directors and to use such an assessment in drafting our affiliation rules.

[34] *See supra* para. 6.

[35] Commenters also should address whether we should adopt a higher management benchmark. The current standard imposes dominant carrier regulation on a U.S. carrier in its provision of international common carrier services when only one of its directors is a representative of a foreign telecommunications entity. *See supra* para. 6.

[36] *See supra* para. 14.

[37] We note the 1991 Economic Report of the President observes that," [f]oreign direct investment in the United States is a sign of strength in the economy. .. and of the increasing internationalization of the economy through which U.S. firms will be strengthened and made more competitive. This investment and the global orientation of companies benefit the United States. The unhindered flow of foreign direct investment leads to additional productive resources in the United States and facilitates the realization of cost-efficient scales of business by consolidating under one corporate roof separate, but related, operations. .. [which] boost the productivity and international competitiveness of the United States, create jobs, and promote innovation and productivity. The inflow of foreign capital helps to sustain U.S. investment ... and thus contributes to economic growth." Economic Report of the President, Transmitted to the Congress February 1991 (U.S. Government Printing Office 1991) at 258. *"The benefits engendered by the global production and trade networks of modern multinational corporations point to the undesirability of devising policies aimed at restricting foreign investment." Id.* at 261 (emphasis in original)." The Administration supports maintaining an open foreign investment policy, with limited exceptions related to national security. This policy produces the greatest possible national benefits from all investments made in the U.S. economy. The United States has long recognized that unhindered international investment is beneficial to all nations, that it is a 'positive sum game.'" *Id.* at 262.

IV. CONCLUSION

42. In this *Notice of Proposed Rulemaking* we tentatively conclude that the U.S. public interest requires that we modify the competitive carrier policy as it relates to "foreign ownership" of U.S. carriers we adopted in our 1985 *International Competitive Carrier* decision. Therefore, we propose a policy in which we would classify carriers as dominant in their provision of international common carrier services on specific routes. We request comments on the issues and proposals addressed in this *Notice of Proposed Rulemaking* and encourage full participation of U.S. carriers, users, and foreign interests.

V. ORDERING CLAUSES

43. Accordingly, IT IS ORDERED that NOTICE IS HEREBY GIVEN of the proposed regulatory action described above, and that COMMENT IS SOUGHT on these proposals.[38]

44. For further information on this item contact Kathleen J. Collins, Assistant Director, Office of International Communications, (202) 632-0935, or Susan O'Connell, Attorney, Common Carrier Bureau, (202) 632-3214.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A
Procedural Matters

Ex Parte Rules - Non-Restricted Proceeding

This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

Initial Regulatory Flexibility Act

Reason for Action

This rulemaking proceeding is initiated to obtain comment regarding proposed modifications to the Commission's 1985 *International Competitive Carrier* decision that adopted a foreign-owned U.S. carrier policy. The proposed modifications replace the policy with a new policy that treats U.S. carriers, whether U.S.- or foreign-owned, that are not dominant under other provisions of the 1985 decisions as dominant in their provision of international common carrier services only for those routes where their affiliates have the ability to discriminate against non-affiliated U.S. carriers through control of bottleneck facilities and services in a foreign market.

Objectives

The Commission seeks to evaluate regulatory modifications that reflect the changed market circumstances for the provision of international common carrier services since the Commission adopted the original policy in 1985.

Legal Basis

The proposed action is authorized under section 1, 4, 7, 201-205, 211, 214, 218-220, 303 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 151, 154, 157, 201-205, 211, 214, 218-220, 303 and 403.

Reporting, Recordkeeping and Other Compliance Requirements

The actions contained in this *Notice of Proposed Rulemaking* may affect large and small carriers. These carriers may be required to comply with the proposed requirement to file certain reports, but this is not estimated to be a significant economic burden for these entities.

Federal Rules That Overlap, Duplicate or Conflict With These Rules

None.

Description, Potential Impact, and Number of Small Entities Involved

The proposals discussed in this *Notice of Proposed Rulemaking* primarily will reduce regulatory requirements on affected carriers by streamlining regulation of foreign-owned U.S. carriers except on those routes where the U.S. carrier is affiliated with a provider of telecommunications facilities and services that has the ability to discriminate against nonaffiliated carriers through control of bottleneck facilities and services in the foreign market. This will respond to comments by affected carriers, most of which are small carriers, that they are subject to regulatory delays under the current policy that prevent them from effectively reacting to marketplace changes. Copies of this *Notice* will be sent to the Chief Counsel for Advocacy of the Small Business Administration.

Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives

The *Notice* solicits comment on a variety of alternatives to achieve Commission objectives.

Paperwork Reduction

The proposals suggested include new reporting requirements that will allow us to assess whether to reduce regulatory treatment for affected U.S. carriers on certain routes. We recognize that implementation of any such requirements may be subject to review by the Office of Management and Budget (OMB). Copies of this *Notice* will be sent to OMB.

[38] This action is taken pursuant to Sections 1, 4, 7, 201-205,.211, 214, 218-220,222(b)(1), 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 151, 154, 157, 201-205, 211, 214, 218-220, 222(b)(1), 303(r), and 403.

Comment Dates

Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before February 26, 1992, and reply comments on or before March 17, 1992. To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to: Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M St., N.W., Washington, D.C. 20554.

APPENDIX B

Proposed Rules

Part 63.01 Contents of applications.

(r) A certification that the applicant is not affiliated with a telecommunications provider in the countries to which it seeks to provide service, or a statement that the applicant is unable to make such a certification.

(1) The certification should state individually those countries in which the applicant does not have an affiliate.

(2) For purposes of this certification, an affiliate is any entity that controls, is controlled by, or is under common control with a provider of telecommunications services or facilities in a foreign market.

(3) In support of the required certification, each applicant shall also provide the name, address, citizenship and principal businesses of its principal shareholders or other equity holders and identify any interlocking directorates.

(4) Any applicant that cannot make the foregoing certification may provide information that demonstrates that its affiliate does not have the ability to discriminate against non-affiliated U.S. international carriers through control of bottleneck facilities and services in the foreign market as defined in the Report and Order in CC Docket No. 91-360 released _____.

Part 43.91 Reports of international carriers affiliated with telecommunications providers in foreign markets.

(a) Every carrier authorized under Section 214 to provide international common carrier services that is affiliated with providers of telecommunications facilities and services in foreign markets shall file a list of such affiliations with the Secretary.

(b) Any carrier authorized under Section 214 to provide international common carrier services that subsequently becomes affiliated with a telecommunications provider in a foreign market shall notify the Secretary within ninety (90) days of the transaction.

SEPARATE STATEMENT OF COMMISSIONER ANDREW C. BARRETT

RE: Regulation of International Common Carrier Services

I support this Notice of Proposed Rulemaking to examine our policy adopted in the 1985 International Competitive Carrier decision regarding regulation of "foreign-owned" U.S. international carriers. I look forward to reviewing the comments in this docket. I would hope that commenters will address the many issues raised in this item, and provide the Commission with a continuum of options within the proposed policy framework that it can assess and analyze. I also am interested in reviewing comments that address the resources the Commission should utilize in making the various assessments proposed in this item. I am particularly concerned that the Commission utilize all resources available within and outside the agency before making assessments of market power and discrimination. I would hope that U.S. agencies with relevant concerns in this area, such as the National Telecommunications and Information Administration [NTIA], the International Trade Administration [ITA], the office of U.S. Trade Representative [USTR], the Department of Treasury, and the Department of State, file comments in this docket. I also hope that the Commission would consider it relevant to obtain comment from telecommunications regulators in overseas markets where affiliation and market power assessments may be required.

This item raises interesting and complex issues. I look forward to discussing the merits of the proposed rules with the various interested parties.